Supreme Court, U.S.
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NO. 09-1001

In The

Supreme Court of the United States

H. Richard Austin,
Petitioner Pro Se

vs.

Douglas G. Peterson & Associates
Stephen W. Houghton,
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Are *U.S. v. Throckmorton,* 98 U.S. 61, *Marshall v. Holmes,* 141 U.S. 589, and related precedents consistent regarding the requirements that govern an independent action (FRCP 60(d)(1), including when the finality of judgments or the principles of equity is the dominant consideration? (*Cf. U.S. v. Beggerly,* 524 US 38, 45 (1998) - (the "precise contours [of an independent action] are somewhat unclear.")

2) When a "new set of facts" emerges so it is "against conscience to execute a judgment," isn't the role of an independent action for fraud to investigate those new facts and not what was fully tried, and by inquiring into the "conduct of the parties" determine if the judgment in question was "obtained directly" by fraudulent act(s) so there was "no adversary trial"?

3) Isn't the central issue in an independent action the negative impact of the fraudulent "act(s)" on the court proceeding instead of whether such conduct can be viewed as "intrinsic" or "extrinsic" - terms that at times overlap so it can be difficult to identify a "precise line" between them. (*Cf. Marine Insurance Company of Alexandria v. Hodgson,* 11 U.S. 332, 336 (1813).

4) Isn't "fraud on the court" (FRCP 60(d)(3)) that species of fraud, in which an attorney ("officer of the court") conspires with others to utilize a fraudulent "scheme" in order to obtain an unconscionable judgment?

TABLE OF CONTENTS

TABLE OF APPENDIX.....iv

TABLE OF CITED AUTHORITIES.....v-vi

OPINION BELOW.....1

JURISDICTION.....1

STATEMENT OF THE CASE.....1

Precedent.....3
1) *Marine Insurance Company of Alexandria v. Hodgson* (11 U.S. 332).....3
2) *U.S. v. Throckmorton* (98 U.S. 61).....4
3) *Marshall v. Holmes* (141 U.S. 589).....5
4) *Toledo Scale Co. v. Computing Scale Co.* (261 U.S. 399).....5
5) *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (322 U.S. 238).....6

That Problematical Distinction - "Intrinsic" versus "Extrinsic" Fraud.....8

The Lower Courts Attempt Their Own Formulation.....9

Fraud On the Court.....10

The Dispute-"A Grave Miscarriage of Justice".....11

1) Subject Matter.....11
2) Investigations of the Fire Site.....14

3) Scientific Fraud.....15
4) Concealed Expert.....17
5) Concealing the Scheme.....20
6) Fabricating Additional, Fraudulent Evidence.....21

Litigation.....25

First Circuit's Order (November 10, 2009).....28

REASONS FOR GRANTING THE WRIT.....29

1.The Law Pertaining to Independent Actions Is Unsettled and Requires a Long-Awaited Clarification By The Supreme Court.....29

2.This Case Constitutes A "Grave Miscarriage Of Justice".....32

CONCLUSION.....33

TABLE OF APPENDIX

ORDER (COURT OF APPEALS FOR THE FIRST CIRCUIT (November 10, 2009).....1a

Quote: **("Austin did not make a sufficient showing to warrant relief under Rule 60(d)(1).")**

TABLE OF AUTHORITIES

Cases

Boone v. Royal Indemnity Company, 460 F.2d 26 (10th Cir. 1972).....13

Browning v. Navarro, 826. F.2d 335 (5th Cir. 1987) 9,10

Bulloch v. United States, 721 F.2d 713 (10th Cir. 1983).....11

Daubert v. Merrell Dow, 509 US 579 (1993).....13

Geo. P. Reintjes Co., v. Riley Stoker Corp., 71 F.3d 44 (1st Cir. 1995) 29

Gleason v. Jandruko, 860 F.2d 556 (2d.Cir. 1988).....10

Graver v. Faurot, 162 U.S. 435 (1896)..... 2,5,30

Great Coastal Exp. v. International Broth., Etc., 675 F.2d 1349 (4th Cir. 1982).....9,10

Hazel-Atlas Glass v. Hartford-Empire Co., 322 U.S. 238 (1944).....6,7,9,11,14,30,32

In Re Genesys Data Technologies, 204 F.3d 124 (4th Cir. 2000).....11

Marine Insurance Company of Alexandria v. Hodgson, 11 U.S. 332 (1813).....i,3,4,31

Marshall v. Holmes, 141 U.S. 589 (1891), ...i,2,3,4,5 ,6,7,8,11, 29, 31,32

Publicker v. Shallcross, 106 F.2d 949 (3d.Cir. 1939).....3

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).....5

Toscano v. C.I.R., 441 F.2d 930 (9th Cir. 1971).....11

Traveler's Indem. Co. v. Gore, 761 F.2d 1549 (11th Cir. 1985).....11

United States v. Beggerly, 524 U.S. 38 (1998)...i,2,7

United States v. Throckmorton, 98 U.S. 61 (1878) i,1,2,3,4,5,6,7,8,10,11,28,29,30,31,32

Westchester Fire Insurance Company v. Deuso, 146 Vt. 424, 505 A.2d 666 (S.Ct. Vermont - 1985).....13

Statutes

FRCP 60(d)(1).....i,9,10
FRCP 60(d)(3).....i
28 USC 1254.....1

Treatises

Moore's Federal Practice 3d - 60.81[1][b][ii].....9

55 *Yale Law Journal,* 623, 658-9 (1946) 9

11 *Federal Practice and Procedure,* 2868, 240-1 C. Wright & A. Miller (1973) 9

OPINION BELOW

The Order from which this appeal is taken was entered by the First Circuit (09-1099) on November 10, 2009.

As stated therein: "(See also *United States v. Throckmorton*, 98 U.S.61 (1878) ('the doctrine is equally well-settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.'))

JURISDICTION

The appeal comes before the Supreme Court pursuant to 28 USC 1254(1).

STATEMENT OF THE CASE

This Petition concerns the standards that govern an independent action in equity, a body of law that has evolved piecemeal over the decades and to this day remains somewhat ill-defined. The subject case involves a judgment that was "obtained" through fraudulent litigation practices or "acts." Among others, these include concealment of an essential witness, who did not reappear until discovery was closed; forged documentation that was used to thwart a key discovery order and also wasn't produced until discovery was closed; false statements by the attorney to a federal judge in open court to mislead him regarding the nature of evidence and the timing when it was produced; use of the discovery period to produce additional, fraudulent evidence on an ongoing basis to defeat discovery; collusion between attorneys and experts, etc.. In essence, this dispute constitutes a textbook

example of how to undermine a judicial proceeding and includes both fraud against the opposing party and the court. All of these nefarious activities are substantiated by explicit documentation attached to the Amended Complaint that is contained in the Joint Appendix submitted to the First Circuit.

In response to the Complaint, none of this extensive evidence was disputed. Nonetheless, in spite of the widespread fraudulent "acts" on which the disputed judgment is based, the Complaint was dismissed. The First Circuit affirmed, citing *U.S. v. Throckmorton,* 98, U.S. 61, 65. **What is involved here is not a dispute over evidence but rather the nature of a judicial remedy that, in spite of its significance, to this day remains ill-defined ("its precise contours are somewhat unclear.")** *United States v. Beggerly,* 524 US 38, 45 (1998).

According to *Throckmorton:*

> ("the acts for which a court of equity will on account of fraud set aside or annul a judgment ... have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.") at 68. Emphasis added.

However, as stated in *Marshall v. Holmes,* 141 US 589, 596 (1891):

> ("any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law...but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.") Emphasis added.

In *Graver v. Faurot,* 162 US 435, 438 (1896), the

Supreme Court noted what the Seventh Circuit considered the conflict between *Throckmorton* and *Holmes:*

> ("the assumption that this court has applied well-settled general principles of law differently in two different cases... While some hesitation in decision may temporarily result until it is finally determined whether that assumption is justified, and, if justified, the anomaly is corrected, we think such determination ought not to be attempted, save where the point must be disposed of on a record after final decree.")

The issue has been noted by other courts as well:

> ("The Supreme Court of the United States, to show its utter impartiality, has ruled both ways, ... Since the courts are at liberty to cite either line of authorities, and do so as suits their convenience, the only possible answer in spite of repeated assertions that the federal rule is clear, is that there is no federal rule at all."

Publicker v. Shallcross, 106 F.2d 949, 951 (3d Cir. 1939). Emphasis added.

Precedent

1) Marine Insurance Company Of Alexandria v. Hodgson, 11 U.S. 332

For more than a century, the relationship of *Throckmorton* and *Holmes* has been debated along with the broader issue of how to harmonize courts of law and chancery. To this day, there remains considerable disagreement on the subject, especially regards the "intrinsic"/"extrinsic" fraud distinction emphasized in *Throckmorton.*

This problematical situation can be viewed as having its genesis in *Marine Insurance Company of Alexandria v. Hodgson*, 11 US 332 (1813). Therein, Justice John Marshall stated the grounds supporting an action in equity that later was quoted by Justice Harlan in the 1891 *Marshall* case. However, at that time the Court also observed:

> ("Without attempting to draw any precise line to which Courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment...") etc. at 336. Emphasis added.

2. U.S. v. Throckmorton (98 U.S. 61)

In 1878, the *Throckmorton* decision was handed down, a dispute involving a 1853 California land claim challenged by the U.S. government. The grounds was that the claim filed by W.A. Richardson was based on a fraudulently back-dated land grant supported by perjured depositions. Although the Court in *Throckmorton* noted the general rule that ("fraud vitiates the most solemn contract, documents, and even judgments"), at 64-5, it denied the government's claim, Justice Miller making his now-famous statement regarding extrinsic or collateral frauds that has occasioned so much debate. In essence, the Justice attempted to do what Justice Marshall would not - employ the intrinsic/ extrinsic distinction to draw what amounts to a "precise line" that should restrain a court of equity from intervening in a judgment no matter how unconscionable.

3. Marshall v. Holmes (141 U.S. 589)

Thirteen years after *Throckmorton*, the Supreme Court again addressed the issue of whether a forgery could provide the basis for granting relief from a judgment. In *Marshall v. Holmes*, a Mrs. Marshall contended that several judgments against her were obtained through a forged letter that was used as evidence in various state court proceedings. The holding of the Court was that Mrs. Marshall could remove her case to federal court on the grounds of diversity. However, it is the dicta in the decision mirroring what Justice Marshall stated almost a century before that is remembered: ("any fact which clearly proves it to be against conscience to execute a judgment...") etc..

Thus, Justice Miller's position in *Throckmorton*, has been viewed as emphasizing the finality of a judgment above other considerations except those considered collateral, while Justices Harlan and Marshall presumably recognized that various "act(s)" (regardless of how they are designated) could provide the grounds for relief. At the same time, *Throckmorton* is cited as precedent in *Holmes* at 596. It is not surprising that courts across the country have encountered difficulty rationalizing the two cases, and as previously noted in *Graver v. Faurot*, the Court did not at that time rule on the matter, leaving open the possibility that at a future time it might do so.

4. Toledo Scale Co., v. Computing Scale Co. (261 US 399)

In 1923, the Court revisited the subject, stating:

(" We do not find ourselves obliged to enter

> upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule... to justify setting aside a decree for fraud, whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense.") at 421. Emphasis added.

It would appear that the Court was indicating that what is considered either intrinsic or extrinsic fraud can support an independent action, in effect abandoning what it refers to as those "somewhat nice distinctions." Subsequently, however, little notice has been taken of this apparently significant statement.

5. Hazel-Atlas Glass Co. v. Hartford Empire Co. (322 US 238)

In 1944 the *Hazel-Atlas Glass* case entered the picture, a dispute involving a forged, scientific article employed to support a 1926 patent application. In addition, the article was used as evidence in court, including before the Third Circuit. However, the article was actually written by officials and lawyers for the company (Hartford-Empire) seeking the patent. When the matter reached the Supreme Court, the Court stated that ("every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments... we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the circuit Court of Appeals.") at 245-6. Emphasis added. In the opinion, Justice Black employed the now-famous term "fraud on the

court." Because the fraud was also directed at the court itself, no concern was shown for the fact that Hazel-Atlas could be viewed as not exercising sufficient diligence uncovering the requisite evidence (what in *Holmes* is referred to as negligence.") In other words, it isn't necessary for a court to rely on a litigant to protect its own interests.

Furthermore, the Court did not attempt an analysis as to whether intrinsic or extrinsic fraud was involved. Based on the usual interpretation of those terms, the subject matter at issue was intrinsic. As a result, in a minority dissent (at 251), Justice Roberts opposed the decision on the grounds that "fraud in the preparation of the document was not extrinsic but intrinsic and will not support review," emphasizing the lack of diligence by the attorneys for Hazel-Atlas. Thus, the problems related to the two categories of fraud surfaced again and demonstrated that the Supreme Court was divided on the subject.

Furthermore, the *Hazel-Atlas* decision cites favorably both *Throckmorton* and *Marshall* at 246, (just as *Holmes* cited *Throckmorton*). In addition, the Court states that ("Proof of the scheme, and of its complete success... is conclusive.") at 246. However, in *Throckmorton*, the success of Richardson's scheme to legitimatize a fictitious deed was not persuasive to the Court. Thus, the situation involving *Throckmorton* and *Holmes* appears to have grown even more confused with the exact nature of this important judicial remedy still in question ("somewhat unclear") *United States v. Beggerley*, 524 US 38, 45 (1998).

The Advisory Committee to the 1946 Amend-

ments of Rule 60 observed that such an equitable action is permitted as far as "established doctrine permits." One can conclude that the traditional independent action had a rather broad character in order to afford a degree of flexibility to meet a variety of circumstances - a consideration that probably influenced Justice Marshall's reluctance to establish a ("precise line to which Courts of equity will advance, and where they cannot pass.") a position that, of course, contrasts markedly with the approach taken by the Court in *Throckmorton.*

In addition, according to the 1946 formulation, the "independent action" became the sole repository of relief for out-of-time actions (exceeding one year) that address fraud, replacing the various, "more narrow," traditional writs that for centuries were utilized. Thus, in modern practice the independent action has taken on a singular importance. Nonetheless, the relevant case law, that defines the scope of the procedure, has evolved piecemeal over many decades and contains a number of gray areas. Furthermore, much of the commentary on the subject has come from the lower courts that have attempted on their own to formalize the procedure while not always agreeing on the subject. Much of the problem is centered on the intrinsic/ extrinsic fraud distinction, and as this case demonstrates, the issue of where to draw the "precise line" between them is still very much in dispute and can at times produce unfortunate results.

6) The Problematical Distinction - "Intrinsic" versus "Extrinsic" Fraud

("At times it is a journey into futility to attempt a distinction between extrinsic and intrinsic matter

... little is to be gained by classifying successful fraud into intrinsic or extrinsic categories.") J. Moore, "Federal Relief from Civil-Judgments," 55 *Yale Law Journal*, 623, 658-9 (1946).

("Distinction is "most unfortunate, if true. [It] rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. It ought not to persist as a limit on independent actions..") 11. C. Wright & A. Miller, *Federal Practice and Procedure*, 2868, at 240-41 (1973).

This criticism is mirrored in the lower courts, some of which do not apply the concept (Third Circuit), while ("most courts continue to observe that distinction in independent actions...") *Moore's Federal Practice 3d*, 60.81[1][b][ii].

("The district court followed the intrinsic/ extrinsic fraud distinction described in *United States v. Throckmorton*, 98 U.S. 61. Under this doctrine, fraud must be "extrinsic" to justify relief... Notwithstanding the considerable criticism... and the debate regarding the effect of *Marshall v. Holmes*, 141 US 589,.") *Great Coastal Exp v. International Broth., Etc.*, 675 F.2d 1349, 1358 (4th Cir. 1982) Emphasis added.

("The distinction that *Throckmorton* made between intrinsic and extrinsic fraud may have become questionable as early as 1891..in *Marshall v. Holmes*, 141 US 870....") *Browning v. Navarro*, 826 F.2d 335, 344, n.11. (5th Cir. 1987). E. added.

7) Lower Courts Attempt Their Own Formulation.

In the current version of Rule 60, the extrinsic/ intrinsic fraud distinction was abolished for a

motion that was given a one-year timeframe. However, the Rule does not address the issue of intrinsic versus extrinsic fraud as the term applies to an independent action. Lacking direction from the Supreme Court, the circuits have on their own tried to reach a compromise, although some contend that the two concepts are no longer valid. As a result, many emphasize what amounts to a lack of opportunity. Thus, while continuing to utilize the distinction, they define extrinsic fraud according to res judicata principles. At the same time, many harmful or obstructionist acts connected to the substance of a trial can still be considered intrinsic and beyond reach of an independent action. Therefore, the lower courts remain free to decide this pivotal issue according to what amounts to a subjective standard.

("[extrinsic] fraud... that infects the actual judicial process, is grounds to set aside a judgment as procured by fraud.") *Browning v. Navarro*, 826 F.2d 335, 344 (5th Cir. 1987).

("aggrieved party seeking relief ...still must be able to show that there was 'no opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action....see *Marshall*, 141 US at 596.") *Gleason v. Jandrucko*, 860 F.2d 556, 560 (2d. Cir. 1988).

("fraud must be 'extrinsic' to justify relief, that is, fraud that actually prevented an issue from being joined.") *Great Coastal Exp. v. International Broth., Etc.*, 675 F.2d 1349, 1358 (4th Cir. 1982).

7) Fraud On The Court

The 1946 version of the Rule also for the first time provided relief from a judgment on the

grounds of "fraud on the court." While citing *Hazel-Atlas*, the Advisory Committee did not specifically define the concept or state how it should be applied. Questions persist as to its scope and meaning. In *Toscano v. C.I.R.,* 441 F.2d 930, 933-4 (1971), the Ninth Circuit stated: ("The distinction between "fraud" on the one hand and "fraud on the court" on the other is by no means clear.") Such fraud has been variously described: ("That otherwise elusive concept...") - *In Re Genesys Data Technologies,* 204 F.3d 124, 130 (2000); ("directed at the judicial machinery.") - *Bulloch v. United States,* 721 F.2d 713, 719 (10th Cir. 1983). What is clear is that such fraud is a special category. Among others, its purpose is to recognize dishonest dealings with the court, especially by an attorney such as occurred in the case underlying this Petition.

The Dispute - "A Grave Miscarriage of Justice"

1) Subject Matter

This long-standing dispute illustrates vividly in its various aspects the type of harmful or "fraudulent acts" that typically support an independent action. The case is centered on a conspiracy that included a national insurance company, attorneys, experts and others, who utilized falsified scientific evidence of fire causation to void a homeowners policy. The "scheme," that involved professionals in at least four states, commenced only a few days after a house fire (November 12, 1993) and long before any dispute arose concerning the fire itself or the relevant insurance. Eventually it became a systematic attack on the judicial process and

demonstrates how far some attorneys are willing to go to undermine legal standards. The prompt, almost routine way it was initiated indicates that at least some of these individuals had considerable experience in this type of activity.

The subject fire completely destroyed Petitioner Austin's home in Warren, Vermont in late-1993, the structure and contents insured by a policy issued by the Hanover Insurance Company, Worcester, Massachusetts a subsidiary of the Allmerica Financial Corporation, a conglomerate listed on the New York Stock Exchange. The amounts of coverage under the policy were determined by the company and their agent and approximately equaled the loss. In other words there was no excess insurance. Subsequently all terms for indemnification were complied with, including the Proofs of Loss establishing the financial parameters of the claim that were accepted by Hanover as fair and accurate. Thus the compensatory damages are liquidated. A few weeks after the fire, Hanover was informed that the purpose of the claim was the prompt reconstruction of the dwelling, and a qualified builder acceptable to the insurer was chosen by the insurer's agent. Over a period of months extensive preparations were made to start reconstruction as soon as the weather permitted. Nonetheless, just as the spring building season arrived, the insurer voided the policy on the grounds of arson and refused to permit reconstruction.

The resulting litigation commenced with an action against the Hanover in August 1994 that resulted in an adverse judgment on August 1, 1997 after a jury trial devoted almost entirely to the

issue of fire causation. During the trial, the insurer did not produce any evidence regarding the essential elements of opportunity and motive. Fraud was not at issue. About a year and a half after trial, however, information was obtained that demonstrates conclusively the judgment was obtained through a conspiracy to fabricate "scientific" evidence that provided the misleading impression the subject fire was deliberately set ("incendiary"). Thus, the fraud went to the heart of the insurer's legal case, establishing through devious means the element that has become indispensable (*sine qua non*) to the so-called arson defense to liability - definitive proof that a fire was in fact deliberately set ("must find...that the fire was of incendiary origin.) *Westchester Fire Insurance Company v. Deuso,* 146 Vt. 424, 426, 505 A.2d 666 (Supreme Ct. - Vermont (1985)). The cases from across the country cited in *Deuso* indicate that any circumstantial evidence relied upon in this regard must be very strong. For instance, *Boone v. Royal Indemnity Company,* 460 F.2d 26, 28 (10th Cir. - 1972) - ("Several pounds of explosive substance had been placed in the building ... explosion preceded the fire...").

To meet this substantial burden, the opinion of experts in fire investigation is generally used. Federal standards control the admissibility of such evidence. The hard evidence that allegedly supported the investigation was falsified lab tests[1] utilizing some sort of material that didn't come

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[1] (". whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.") *Daubert v. Merrell Dow,* 509, U S 579, 593 (1993)

from the subject fire site. The other, key aspect of the scheme was the ongoing campaign engineered by Hanover's attorneys to undermine the judicial process so it could not function correctly. Furthermore, the dishonest way in which the attorneys dealt with the court ultimately rose to the level of "fraud on the court" (*Hazel-Atlas Glass v. Hartford-Empire Co.*, 322 US 238.

2) Investigations of the Fire Site

Pursuant to a voluntary release provided by Petitioner, Hanover conducted the investigation of the site that was supposed to determine the fire's cause. The work for the insurer was done by defendant Douglas G. Peterson & Associates, Greenfield, Massachusetts, under the direction of defendant Stephen W. Houghton.

Over several years Petitioner personally built much of the house that contained many unique features, including a complex, electrical system with computer and satellite dish components. To this day, he still considers the wood stove the most likely cause of the fire. It served as a back-up source of heat to a hot-water, oil-fired system with multi-zones that covered the entire structure. The stove, that was on the ground floor, was connected to a tall chimney with a strong draft and had previously overheated, resulting in two, chimney fires that damaged the flue tiles.

Relying on the insurer's commitment to share the results of its examination, Petitioner did not have his own investigator. This commitment was not kept, and some preliminary information regarding Hanover's supposed "scientific" evidence of arson was only obtained through a court hearing

and order in mid-1996, or almost three years after the fire. As a means of broadening the resources brought to the investigation, Petitioner also provided a voluntary, unrestricted release to the Vermont State Police so they could participate in the work at the site. Their investigation took place on November 15 and 16 and utilized a dog trained to detect petroleum-based substances in fire debris. Tests performed at the New York State Crime Lab were all negative, and it has never been determined what the dog might have detected. The officer (Harrington), who performed the police investigation, stated at his sworn deposition that no one knows what the dog detected.

The insurers' investigator, George Wilson of Douglas G. Peterson, was present during the police investigation and also worked there by himself on November 24. Wilson's work on the 24 provides the basis for his report that supposedly established by recognized, scientific procedures that the probable cause of the fire was an accelerant being poured in the laundry room. The information that has emerged over several years, however, demonstrates conclusively that the report is a cynical fabrication intended to serve the objective of thwarting Petitioner's insurance claim.

3) The Scientific Fraud

While at the site on November 24, Wilson took numerous photographs and collected eight samples from the utility/laundry room area. This debris was supposedly shipped to the Mercury Research Lab in Cary, North Carolina, where analytical tests were performed on a Hewlett Packard gas chromatograph/ mass spectrometer (GCMS). It is further

alleged that two of the eight samples tested positive for an accelerant initially identified as kerosene. Later, this was changed to No.2 fuel oil or home heating oil.

It is now beyond reasonable doubt, however, that the tests were ordered from the lab before Wilson returned to the site on the 24 for the purpose of fabricating a report that would utilize the fake tests. The two, allegedly positive tests are dated respectively November 25, 1993, 2:32am (sample #4) and November 25, 1993, 4:00am (sample #6). (See Joint Appendix in the First Circuit, pgs. 36-37; 231-232). Such a date/time is generated automatically by the GCMS at the inception of a test and encrypted along with the rest of the data in binary code (computer language). It cannot be altered later without destroying a significant portion of the test file. The date/time is produced by an internal clock that runs automatically even when the computer is turned off because it is supported by a CMOS battery. These batteries are very reliable and long-lasting. In the unlikely event that one failed, any date/time would be lost along with the computer's BIOS (basic in/out or operational instructions). [2] Hence, the computer would not be able to function correctly when the

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[2] For further details, the sworn statements of Petitioner's experts are provided in the Joint Appendix. Mr. Jay Chrystal is President and Lab Manager of ChemServe, Milford, New Hampshire, an environmental testing lab accredited nationally (Joint Appendix - pgs 52-70) Dr Donald Hesse is a chemist and software engineer from Saint Louis, Missouri (Joint Appendix - pgs 71-89). At that time Chrystal and Hesse had almost 40 years of combined experience in the testing field, which includes working with Hewlett Packard GCMS equipment.

GCMS was restarted. It would, of course, be impossible not to notice such a situation.

Having spent most of November 24 at the site, Wilson had to drive back to the offices of Douglas G. Peterson & Associates in Greenfield Massachusetts (about five hours), sort and package the samples and ship them to Cary, North Carolina, which is about one-thousand miles away. After reaching the Mercury Lab, the samples had to be unpacked and undergo extensive preparation. This last step is an overnight process. All of this, including transport over such a long distance, would have to take place in only a few hours so the tests could be performed in the early morning of November 25. Obviously this is completely impossible. Despite repeated opportunities, Hanover's experts have not been able to provide a scientifically plausible explanation for the date/time discrepancy contained in the lab tests that allegedly support George Wilson's opinion of arson.

4) Concealed Expert

At the trial Jimmy Pau, technical director of the Mercury Lab, who for several months could not be located, provided deliberately false testimony with the assistance of attorney Gregory Clayton in order to deceive the jury about the tests. (Joint Appendix - pgs. 46-51, especially 49 and 51). According to Pau, the samples didn't reach the lab until November 30 and the tests conducted on December 1. He attempted to explain the date/time discrepancy by alleging that the computer in the GCMS had been turned off for six, straight days because of electrical problems in the Cary, North Carolina

area. Allegedly this stopped the internal clock that generates the date/time. Thus, when the computer was turned back on so the tests could be conducted, there was the discrepancy of six days. As Pau stated falsely under oath: "You have to set the date and the time [3]...after you turn it off, you have to reset it... you need to reset the clock every time you run that." (p.49) This explanation is obviously false and contradicts the way the clock in the GCMS's computer functions, including the fact it is supported by a battery. Since there is this reserve source of power, it isn't necessary "every time" to reset the clock which continues to run on its own. Furthermore, Pau testified that when the tests took place, lab personnel didn't notice that the computer generated an erroneous date/time six days before the date when the tests were supposedly performed. However, an electronic clock, such as that in a GCMS's computer, is not like a mechanical clock that continues to display the time when it stops running. In the event the source of power ceases,

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[3] A. (Chrystal) Those dates and times are what are called the acquisition time. The place where it gets the time is from the real-time clock, which is on the motherboard of the computer...

Q. That clock is supported by a battery; is that correct?

A. That is correct.

(Jay Chrystal statement - Joint Appendix, pgs. 57-58.

A. When the instrument is going to start collection on an alga run, it reads the date and time from the computer system clock, and inserts that into the data file...

Q. Okay. Now the statement that is necessary every time at the beginning of a test to set the internal clock wouldn't that be false.

A. Yes. That would be false It is not necessary to set the date and time before each analytical run.

(Dr. Hesse's statement - Joint Appendix, pgs 77-78)

any date/ time is lost along with the computer's operational instructions (BIOS). (Chrystal statement - p. 59 - "It (ie. the battery) sustains all of the bio(s) settings for the computer itself." ln.4)

Equally revealing is the fact that Pau's testimony is disproved by the lab's own written correspondence related to the analytical tests. In a letter dated December 2, 1993 addressed to Douglas G. Peterson and reporting the testing of the samples supposedly acquired by Wilson on November 24 (Joint Appendix pgs. 40-42), reference is made to the lab's "quality assurance program" performed immediately prior to testing so the GCMS would function accurately. As stated: "A quality assurance program was incorporated into the standard analytical operating procedure. The QA program consists of a daily auto-tune of the mass spectrometer and a standard calibration run on the GCMS system. This program ensures the proper calibration of both GC and MS instrument." (emphasis added). Since this "auto-tune" program was being conducted on a "daily" basis, the computer that controls the equipment could not have been turned off for six, straight days - ("Daily (adj.) - occurring, made, or acted upon everyday"- *Merriam-Webster's Collegiate Dictionary*, 11th Ed,, p. 313.) Furthermore, it is totally implausible that just after conducting a quality assurance review of the GCMS prior to testing, the operator didn't notice that the computer that controls the equipment wasn't functioning correctly (ie. the BIOS was lost). *Based only on this written evidence from the lab itself, there is no other possibility except that Pau's explanation of the date-time discrepancy given under oath before the jury is deliberately false and*

the tests and fire investigation a total fraud.

The date/time discrepancy was the result of an unanticipated change in George Wilson's schedule. Originally he returned to the site on November 22. However, Petitioner would not allow him to proceed without assurance that the results of his work would be shared. Hence, he had to come back on the 24, causing the discrepancy, which resulted in the fraud being detected.

Finally it should be noted that at no time during the trial did Petitioner assert fraud. Although he suspected that something unusual was involved, he was unable to obtain the requisite information to make such a serious accusation. Thus the questioning of the various experts emphasized what was considered their lack of professionalism.

5) Concealing the Scheme

After the litigation commenced, the attorneys, Harold Eaton of Woodstock Vermont and then Gregory Clayton of Littleton, New Hampshire, conducted an ongoing campaign to undermine the court proceeding, including discovery. This included generating in increments additional, falsified evidence in order to stay a step ahead of the inquiry. Also, the insurer did not voluntarily produce for deposition the experts connected to its own fire investigation. Afterward, neither Wilson or Pau would sign their preliminary telephone depositions - something that is not typical of truthful, scientific experts. At that point Pau abruptly disappeared "somewhere abroad" so his deposition could not be completed in person at the lab and his records examined. When Petitioner contacted lab personnel trying to ascertain where

Pau was located, Attorney Clayton repeatedly threatened sanctions, making clear his determination to prevent further contact with this important, material witness. (Joint Appendix pgs. 90-92). Since Pau did not reappear until discovery was closed, it was never possible to finish questioning him about the tests.

After Pau finally resurfaced, he cooperated with Attorney Clayton to produce a forged document falsely attributed to the prestigious American Society of Testing and Materials. This includes a cover letter from Clayton (November 25, 1996) endorsing the document as authentic. (Joint Appendix pgs. 93-94). The immediate purpose of this deceptive act was to nullify an important court order (October 28, 1996) regarding relevant information promised by Pau. However, this spurious document was only produced after discovery ended so Pau could not be questioned about this subject as well. At the trial Pau admitted the document he produced was not authentic. (Joint Appendix pgs. 95-96)

6) Fabricating Additional, Fraudulent Evidence

Of significance is the fact that while discovery was in progress, Wilson and the other experts tried intermittently to undermine their own opinions so they would be excluded by the court. Having become aware of the date/time discrepancy in the lab tests, they no doubt acted in this fashion out of concern for potential legal consequences.

As a result, during his telephone deposition (August 6, 1996) Wilson explicitly repudiated his own fire investigation. (Joint Appendix pgs. 97-

100). The focus of his supposedly authoritative report is a so-called "accelerant pour pattern" allegedly found on the laundry room floor and documented by photographs. Nonetheless, during his deposition, Wilson stated under oath that "I don't believe I indicated where an accelerant was actually poured... How much was poured or where it was actually physically poured, I do not know.." (Joint Appendix pgs. 99-100). With discovery thwarted, however, Wilson reappeared at the trial and once again reversed himself, stating that he really did find what he stated in his report.

While exhibiting an obvious concern for adverse consequences, the experts also continued intermittently to participate in the fraud and thereby earn additional sums of money for their "scientific" research. As a result Hanover and its operatives, including the attorneys, utilized the discovery period to falsify additional evidence in the ongoing effort to salvage the scheme. This involved the direct participation of defendant Stephen Houghton, who previously remained in the background supervising George Wilson. (Apparently at this point, Wilson was no longer willing to participate in further "research.") As a result Houghton traveled to the site in Warren, Vermont and supposedly obtained a liquid sample from the underground fuel tank that had been unattended for three years. At the time it was in the midst of a construction project to build a house for the new owner of the property. Another test was performed at the Mercury Lab and allegedly established that the accelerant that was never actually found came from the tank.

The letter of June 21, 1996 (Joint Appendix p.

101) from the lab indicates how closely the attorneys were monitoring the activities of the experts so no further mistakes would be made. Previously, when the original, two, falsified tests were produced, the correspondence from the Mercury Lab was addressed to defendant Stephen Houghton. (Joint Appendix pgs.40-42, and p.43), who then wrote to Attorney Harold Eaton about the matter. (Joint Appendix pgs. 44-45). However, after the dating problem arose, all the correspondence from the lab went directly to Attorney Clayton, who was now exerting direct control over the production of the fraudulent evidence.

This continues with the letter dated March 6, 1997 from the lab (also addressed to Clayton) that concerns the next step in the campaign to prop up the scheme and reinstate the credibility of the initial two, falsified tests. This latest fakery conveniently made its appearance just as the case was placed on the trial calendar. It consisted of some paper stuffed in a gallon tin can partially filled with fuel oil. The item was produced by Officer David Harrington of the Vermont State Police more than three and one-half years after the fire. Harrington produced the substance in the can in spite of the fact that during his deposition on July 2, 1996 (almost a year before Petitioner was actually informed), neither he or Attorney Clayton disclosed the existence of this allegedly relevant evidence in response to repeated and emphatic questions about any relevant, "physical" items "in the possession" of the Vermont State Police. (Joint Appendix pgs.104-106).

At the pretrial conference on July 1, 1997, Attorney Clayton deliberately deceived the trial

judge (Murtha), who was new to the case, regarding the timing when Petitioner was actually informed. (Joint-Appendix pgs. 111-114). Clayton's statement to the court: "The moment we got that report back from the lab we sent this to Mr. Austin...". (p. 112). However, compare this to the letter from the lab dated March 6, 1997 (Joint Appendix p. 110), in which the results of the test on the substance in the can were first reported to Clayton. Furthermore, note his letter dated May 21, 1997 (Joint Appendix p.107), when the information was finally sent to Petitioner, or almost three months later. Also note the letter to Clayton dated May 19, 1997 belatedly generated by Stephen Houghton, in which the attempt is made to give the false impression that the attorney just learned about the test results (Joint Appendix p.108-109). However, in explicit language the letter from the Mercury Lab (March 6) demonstrates otherwise.

Allegedly the item that appeared so suddenly was the newspaper (copy of the Wall Street Journal) found after the fire on the front lawn near a stump Petitioner was cutting up with a chainsaw. The real newspaper, that originally was in his wheelbarrow, had been lying there about a month. At the trial Petitioner for the first time saw the item, that was definitely not what had been on his lawn. Presumably, the objective was to provide corroboration of arson through something independent of the falsified tests that might still be regarded as suspect. However, since its is known without doubt that the substance found in the first two, falsified tests didn't come from the fire site, finding it in two, additional tests only compounded the fraud.

Ultimately the can of oil ended up in the jury room, where the acrid smell would have produced a powerful and confusing, psychological impression on the jury already prejudiced by days of falsified "expert" testimony. Essentially, this was the proverbial *coup de grace* of what amounted to a cynical, dramatic performance. In all, four experts (Pau, Wilson, Houghton and Harrington) perjured themselves regarding the fraudulent evidence in order to legitimatize it in the eyes of the jury. To augment the smelly substance in the can, the senses of the jury members were further impacted by impressive displays (three-feet in length), which allegedly depicted in vivid color the pour pattern that George Wilson previously stated under oath at his deposition that he never found. All of this commenced with a lengthy dissertation by Officer Harrington on the "science" of fire investigation.

Finally, it should be noted that the initial litigation took place in a district court (Vermont), where the judge (Sessions), who was handling the case, had a heart attack. As a result, the file was transferred repeatedly, dealt with by various personnel and the trial conducted by a judge (Murtha), who was largely unfamiliar with the case. Thus, this complex dispute took place within a highly chaotic context that enabled the defendant insurer, attorneys and experts (including the current defendants) to capitalize on the resulting confusion and undermine completely the court proceeding.

Litigation

The lengthy history of this dispute has taken place in five stages (*Austin I - V*) initiated

sequentially by Petitioner (as a pro se) over a period of approximately 16 years. *Austin I* is the initial action against the Hanover Insurance Company that ended in the adverse judgment procured by fraud. Subsequently, in *Austin II - IV* all of Petitioner's Complaints based on the late-discovered evidence were dismissed without any hearings or findings of fact. The district court (Vermont) and the Second Circuit based their adverse decisions on a standard of review that mirrors a strict reliance on the intrinsic/ extrinsic fraud distinction but is expressed in what amounts to contradictory res judicata principles. About a year and a half after trial, Petitioner finally obtained the information that proves the so-called scientific evidence relied on by the Hanover in *Austin I* is a complete fraud. As a result, an independent action (*Austin II*) was filed against the insurer (99-CV-252 Vt). There were no proceeding at the trial level, and instead the case was promptly dismissed. An unsuccessful appeal to the Second Circuit (00-9235) followed, the resulting order indicating the appellate court did not go back in the file or realize that an independent action was involved - in other words there was no de novo review.

Austin III (03-CV-204 Vt) was then filed against the attorneys and experts (including the current defendants) who conspired with the insurer in *Austin I*. Once again the case was dismissed with no proceedings or specific findings of fact - this time on the contradictory and mutually exclusive grounds of res judicata and collateral estoppel. Another appeal to the Second Circuit (03-9264) followed, and the court affirmed on the grounds of

collateral estoppel. At the same time the court indicated that a de novo review of the case was not performed and hence there were once again no findings of fact at the appellate level.

The next stage (*Austin IV*) was an independent action against the attorneys in the Eastern District of Missouri. The case was filed in Saint Louis because the litigation commenced there in 1994. At the time the Hanover obtained a change of venue to Vermont on the grounds of false statements made to the court regarding the falsified, scientific evidence. In other words, the case was moved halfway across the country to facilitate a fraud. After a nine-month delay, the court declined jurisdiction, and the case was sent back to Vermont (06-CV-38). In its order the First Circuit states incorrectly that ("We join our sister appellate courts in the Eighth Circuit and the Second Circuit in admonishing Austin...") However, this matter was never before the Eighth Circuit that expressed no opinion on the subject.

After the case was returned to Vermont, it was dismissed again. There was another appeal to the Second Circuit (06-4203), that issued an order also based on the contradictory grounds of both collateral estoppel and res judicata. It will be recalled that another Second Circuit panel (*Austin III*) concluded that these same attorneys were not privies (ie. collateral estoppel). In a footnote, however, the curious statement appears that presumably indicates that all of the defendants in the various stages of the litigation were privies. Once again there were no findings of fact at the appellate level.

Thus, although the matter had dragged on since

1994, no valid litigation ever took place. The original action was undermined completely by fraud, and all of the subsequent actions were dismissed by the trial court without proceedings or specific findings and then confirmed at the appellate level - twice without a de novo review. In effect, during all this time the matter went essentially nowhere.

In *Austin V*, the district of Massachusetts dismissed the current independent action against the defendant experts on the grounds of judicial comity and the state statute of limitations even though a prior state case is not involved. Subsequently the First Circuit affirmed on the grounds of a literal interpretation of *U.S. v. Throckmorton* (ie. all of the frauds that occurred are intrinsic and hence barred.)

As noted, in all of the relevant orders there is some sort of significant, judicial error. The prior litigation is discussed in the Amended Complaint, pgs. 27-31 in the Joint Appendix, and the resulting orders are at pgs. 192-215. Finally, it should be noted that at the various prior stages, Petitioner unsuccessfully sought certiorari. However, the grounds were different from those presented in the current Petition.

First Circuit's Order (November 10, 2009)

As previously stated, the initial action (*Austin I*), including the trial, is a prime example of how to undermine a modern judicial proceeding by fraudulent "acts." Essentially this was a corrupted situation that no litigant could deal with effectively so in *Austin I* there never was an "adversary" proceeding. Nonetheless, in its recent order the

First Circuit states that ("the possibility of perjury, even concerted, is a common hazard of the adversary process with which the litigants are equipped to deal through discovery and cross-examination"), citing *Geo. P. Reintjes Co., v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir. 1995) (emphasis added); and *Throckmorton* at 66. However, *Throckmorton* also states that relief can be obtained through an equity proceeding when (" a judgment was obtained directly by fraud") at 66 emphasis added; and ("by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case.") at 65 (emphasis added).

Similarly in *Marshall v. Holmes*, the Court takes note of the need ("to scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it...") at 599, Emphasis added. **The citations from *Throck-morton* and *Holmes* describe exactly the situation involved in this case, where the judgment wasn't merely "based" on fraudulent evidence (so-called common law fraud) but instead was "obtained" by fraudulent acts directed at Petitioner and also the court.**

REASONS FOR GRANTING THE WRIT

1. The Law Pertaining To Independent Actions Is Unsettled And Requires A Long-Awaited Clarification By The Supreme Court.

The "independent action" (60d)(1) is an essential repository of relief from unconscionable judgments,

combining in one vehicle various, traditional remedies. Furthermore, it is the only means of addressing late-discovered evidence of complex frauds. Long ago, the Court in *Graver v. Faurot* noted the apparent problem of harmonizing *Throckmorton* and *Holmes* and the need to clarify the situation. Nonetheless, the situation among the lower courts continues to lack a coherence that only the Supreme Court can provide.

It is not difficult to understand why some perceive a conflict between *Throckmorton* and *Holmes,* although Petitioner does not share that position. The determining consideration in *Throckmorton* was that the government's lawyer knew about the fraud and failed to act upon this important information. Mrs. Holmes, however, did not and could not have known about the fraudulent letter used to obtain the various judgments against her. In these and other precedents, the need of reasonable diligence is emphasized in order to protect the finality of judgments. At the same time, the important consideration is also stressed repeatedly that an independent action can intervene when the successful litigant made a concerted effort to prevent a fair trial. *Hazel-Atlas* is, of course, highly similar to the case reviewed in this Petition that involves a premeditated scheme, attorney involvement and also dishonest actions directed not only at the opposing party but the court itself.

Much of the problem of harmonizing *Throckmorton* and *Holmes* and similar cases stems from terminology and the attempt to draw the "precise line" of which Justice Marshall was so wary. A "fraud practiced directly upon a party," that might

be regarded as extrinsic or collateral, can be connected in a significant way to what is intrinsic to the judgment and therefore potentially ruled out. Inevitably the two forms of fraud overlap and are entwined. It can be argued that the distinction is unnecessary and at times counter-productive, creating uncertainty when it attempts to do the opposite.

In the instant case the falsified lab tests can be viewed as intrinsic, while the concealment of the lab director's location so he could not be deposed and his records examined as extrinsic. Similarly the foul-smelling substance in the tin can that ended up in the jury room might also be viewed as intrinsic while the concealment until discovery was closed and the deliberately false statements made to the judge at the pretrial conference as extrinsic in character. The misuse of discovery by the Hanover and its operatives (including defendants) to produce additional, fraudulent evidence on an ongoing basis to thwart discovery can be interpreted as either intrinsic or extrinsic, or both.

Thockmorton, Holmes and *Marine Insurance* all speak of unconscionable "acts" through which the fraudulent judgment was "obtained." Thus, in *Austin I,* **the fraudulent evidence (falsified lab tests and investigation) was protected by fraudulent litigation "acts" or tactics - the one concealing and abetting the other so the subject matter was ("never actually presented," nor was it "capable of being discussed there.") Throckmorton at 66-7.**

Unfortunately the wording in *Throckmorton* at times complicates the matter. Thus it is stated that the extrinsic label cannot be applied ("to a fraud in

the matter on which the decree was rendered.") at 68, while at the same time the Court speaks of a ("hindrance besides the negligence of the defendant.") at 66. A court can conceivably regard any misdeed if connected to the subject matter tried as intrinsic in nature. In the seminal *Hazel-Atlas* precedent, Justice Roberts dissented, viewing the egregious frauds employed there as all intrinsic and therefore not forming the basis of an independent action. **The order of the First Circuit in dispute here adopts what amounts to a similar position, viewing the *Throckmorton* and *Holmes* cases as essentially inconsistent.**

2. This Case Constitutes A "Grave Miscarriage Of Justice."

The fire that destroyed Petitioner's home occurred 17 long years ago. It was a fine dwelling where he lived for 15 years, much of the house built at great effort with his own personal craftsmanship. In addition, he lost the possessions acquired over decades, the library and business papers on which he depended to earn a living, and also items of great personal importance, including manuscripts. Subsequently he turned to the judicial system to enforce the insurance policy that he purchased in good faith so he could promptly rebuild his home and get on with his life. Unfortunately the legitimate rights he attempted to assert in court were thwarted by an elaborate, ongoing scheme so in effect he had no rights in court. To compound the problem he has been compelled to deal with an unsettled body of law that by its amorphous character can invite a miscarriage of justice such as this one.

In the responses to Petitioner's various Complaints in *Austin II - V*, the supporting evidence of fraud was not contested. This evidence is not only clear and convincing but virtually indisputable. Furthermore, there have been no findings of fact by any lower court on which a contrary conclusion can be based.

In that regard attention should be drawn to the belated attempt before the First Circuit to involve some sort of amicus - a Mr. Ritchie. Petitioner has never heard of him and did not receive any copies of what he submitted to the court. Consequently he isn't sure what Ritchie is trying to allege. During all the years this litigation has been in progress, Ritchie never participated in the matter in any way and has no direct interest in the dispute. Presumably he is some sort of expert being paid to offer an opinion about a subject about which he has no direct knowledge. In an *en banc* decision (six judges), the First Circuit rejected his participation (July 22, 2009).

CONCLUSION

The facts of this dispute "clearly prove(s) it to be against conscience" to allow this unfortunate situation to remain uncorrected. The First Circuit's Order is clearly in conflict with the equitable principles that underlie independent actions. The evidence supporting the Amended Complaint is clear and convincing as well as uncontested. Furthermore, this case provides an opportunity to address the various issues related to independent actions that for decades have remained in doubt. As a result, the Court can appropriately consider disposing of this case in a summary manner and

also granting the relief sought in the Amended Complaint (liquidated monetary damages - $1,918,202 plus allowable interest since prior calculation).

Respectfully submitted,

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St. Louis, Missouri January 29, 2010

APPENDIX NO. 1

United States Court of Appeals
For the First Circuit

No. 09-1099

H. RICHARD AUSTIN,
Plaintiff, Appellant,

v.

DOUGLAS G. PETERSON & ASSOCIATES, ET. AL.,
Defendants, Appellees

Before
Boudin, Selya and Lipez,
Circuit Judges

JUDGMENT
Entered: November 10, 2009

Pro se appellant H. Richard Austin appeals from the district court's dismissal of his independent action against appellees Douglas G. Peterson & Associates, Inc, and Stephen Houghton, brought pursuant to Rule 60(d)(1) of the Federal Rules of Civil Procedure. After careful de novo review of the record, Estate of Bennett v. Wainwright, 548 F.3d 155, 162 (1st. Cir. 2008), we affirm.

This is Austin's fifth lawsuit following the fire that destroyed his home in Warren, Vermont, in November 1993. Austin v. Hanover Ins. Co., 165 F.3d 13 (2d Cir. Nov. 12, 1998), 1998 WL 801885 (unpublished table decision), cert. denied, 527 US 1004 (1999) (Austin I); Austin v. Hanover Ins. Co., 14 Fed. Appx. 109 (2d Cir. Jul, 13, 2001), 2001 WL 799188 (unpublished decision), cert. denied 534 U.S. 954 (2001) (Austin II); Austin v. Downs, Rachlin & Martin, 2003 WL 23273466 (D.Vt. Nov. 3, 2003), aff'd 114 Fed. Appx. 21 (2d Cir. Nov. 4, 2004) (unpublished decision), 2004 WL 2476474, cert. denied, 544 U.S. 961 (2005) (Austin III); Austin v. Downs Rachlin & Martin, U.S. District Court District of Vermont Docket No. 06-38, aff'd, U.S. Court of Appeals for the Second Circuit Appeal No. 06-4203, cert. denied, U.S. Supreme Court Docket No. 07-1409 (Austin IV), Both Austin II and Austin IV were independent actions in equity brought pursuant to Rule 60(d)(1) (formerly Rule 60(b)) seeking to set aside the judgment for defendants in Austin I. The present appellees were named defendants in Austin III. At every point in each of his four prior litigations, Austin has failed to make a case that appellees and others in concert with them fabricated evidence and suborned perjury in order to avoid paying out on his homeowners policy after the fire.

In the present matter, Austin repeats his prior claims of fraud and conspiracy. We are compelled to conclude, as have our sister circuits who have reviewed virtually identical claims in Austin's previous suits, that Austin **has failed to make out a viable claim under Rule 60(d)(1).** Our circuit "insist[s] on severe conditions to the assertion of

such a claim, due diligence in the discovery of the fraud in the original action and clear and convincing evidence of fraud in the collateral one." Lundborg v. Phoenix Leasing, Inc. 91 F.3d 265, 271 (1st Cir. 1996). "The possibility of perjury, even concerted, is a common hazard of the adversary process with which the litigants are equipped to deal through discovery and cross-examination, and where warranted, motion for relief from judgment to the presiding court." Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1995)) Moreover, "[d]iscrediting witnesses does not generally justify an 'extraordinary' second opportunity." Id. (quoting Xerox Financial Services Life Ins. Co. v. High Plains Ltd., 44 F.3d 1033, 1038-9 (1st Cir.1995) See also United States v. Throckmorton, 98 U.S. 61 (1878) ("the doctrine is equally well-settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence or for any mater which was actually presented and considered in the judgment assailed."

Accepting Austin's well-pleaded facts as true and indulging all reasonable inference in his favor, we conclude that Austin **did not make a sufficient showing to warrant relief under Rule 60(d)(1).** Emphasis added.

We join our sister appellate courts in the Eighth Circuit and the Second Circuit in admonishing Austin that he has repeatedly filed duplicative lawsuits and can have no objective good faith expectation of succeeding on his claims. Appellees have been repeatedly haled into court and forced to defend against baseless litigation, engaging the

judicial resources of the federal district and circuit courts of three states. Austin has had his day in court (in fact, several of them). There is nothing to be gained in further proceedings.

The judgment of the district court is affirmed. Costs to appellees. Fed. R. App. P. 39(a)(2).

By the Court:

/s/ Margaret Carter, Chief Deputy Clerk